Volume 71

50158

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. LEONARD PULEO, Defendant-Appellant.	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY, CRIMINAL DIVISION.

MR. JUSTICE SCHWARTZ DELIVERED THE OPINION OF THE COURT.

After a trial by jury defendant was found guilty of theft and sentenced to one to ten years in the penitentiary. The state confesses error in that defendant's confession was improperly admitted into evidence under the recent ruling in People v. Halstrom, 34 Ill. 2d 20, 213 N.E.2d 498, and moves that the judgment be reversed and the cause remanded. In the Halstrom case the Illinois Supreme Court interpreted Massiah v. United States, 377 U.S. 201, 84 S. Ct. 1199, as applied in McLeod v. Ohio, 378 U.S. 582, 84 S. Ct. 1922, as requiring the reversal of a conviction where a confession had been introduced which was "obtained subsequent to indictment, from a defendant who is not represented by counsel and has not knowingly waived his right thereto." (pp. 21-2).

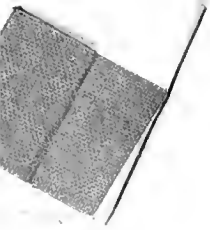
In the instant case, defendant's confession was taken by a shorthand reporter during police interrogation at the police station. Admittedly this occurred after indictment and prior to defendant's obtaining counsel or waiving his right thereto.

We are not bound by the state's confession of error as to the disposition of this case. People v. Kelly, 66 Ill. App. 2d 204, 214 N.E.2d 290; People v. Allen, Gen. No. 49950, Illinois Appellate Court, First District. On independent investigation of the record, however, we have concluded that the judgment should be reversed and the cause remanded for a new trial.

Judgment reversed and cause remanded

Sullivan, P.J., and Dempsey, J., concur.

Abstract only.



Filed June 6

Released

71 I.A.2 282

Case No. 66-5

In The

APPELLATE COURT OF ILLINOIS

Abstract

Third District

A.D. 1966

JUNE PARSONS, Plaintiff-Appellant,	)	Appeal from the Circuit Court of Bureau County
vs.	)	
GEORGE PARSONS, Defendant-Appellee.	)	Honorable Howard C. Ryan, Judge Presiding.

STOUDER, J.

This is an appeal from an order of the Circuit Court of Bureau County denying the petition of June Parsons for modification of a divorce decree by changing custody of a minor child from the respondent father to the petitioner mother. The parties were divorced in November, 1964. The decree awarded custody of the two minor children of the marriage to petitioner herein. On February 25, 1965 pursuant to the father's petition the decree was modified and the custody of Jamie, the minor involved in this proceeding, was then awarded to the father. In October, 1965 this petition was filed by the mother asking that the custody of Jamie be returned to her. This appeal follows from a denial of such petition.

Both parties are in agreement on the general principles applicable to the custody of minors, namely that the primary concern of the court is the best interest and welfare of the minor and that the original decree will not and should not be disturbed unless there has been a change in circumstances affecting the best interest of the minor. Hirth vs. Hirth 59 Ill. App. 2d 240, 207 N.E. 2d 114, and Nye vs. Nye 411 Ill. 408, 105 N.E. 2d 300. The issue arises in the application of these principles to the circumstances. Petitioner claims that the continuing

custody of the father is against the best interests of the minor and consequently the order of the trial court is an abuse of its discretion. Respondent claims that no abuse of discretion is shown, that it is for the best interest of the minor that the minor remain in his custody and that the order of the court is amply supported by the evidence.

In seeking a reversal of the trial court's order petitioner argues it is undisputed that respondent testified falsely at the hearing which resulted in custody of Jamie being granted to respondent by the order of February 25, 1965. At such hearing respondent testified he was married to the person with whom he was living, when in truth he did not marry this person until several months later. Petitioner also argues the 12 year old daughter of respondent's present wife is of immoral character as shown by a letter written sometime prior to her becoming a member of respondent's household.

In support of the trial court's order respondent contends the evidence shows that Jamie is 16 years old, wants to live with his father, wants to continue attending Hall Township High School which would not be possible if he lived with his mother since she moved to LaSalle at about the time he went to live with his father. It also appears that Jamie is achieving satisfactorily in high school, is adequately fed, clothed and housed and has a satisfactory relationship with his father and step-mother.

The question before us is whether or not the admittedly false testimony of respondent and the alleged immoral character of a member of respondent's household are conditions determining conclusively the best interest of the minor. The letter relied upon by petitioner tending to show the immoral character of respondent's household was written by a 12 year old girl, never delivered and its truth was in no way substantiated. No doubt the trial court gave little weight to this evidence and we concur that although it was properly considered, little significance can be attached to it. We can not and do not condone the giving of false testimony by respondent. Yet this is only a circumstance to be weighed, considered and balanced

with all other circumstances in determining the course of action best suited to the interests of the minor.

Petitioner objects to the finding of the trial court that she consented to the change of her son's custody as provided in the order of February 25, 1965 and that she knew of the circumstances as they then existed. We believe that such an inference could properly have been drawn by the trial court from the pleadings, evidence and conduct of the parties. The consent of the parents does not prevent the court from fully and completely considering all circumstances relating to a minor's best interests. Such consent is relevant in the ascertainment of motive as well as being indicative of petitioner's view of the fitness of respondent. Nye vs. Nye, supra.

Section 136, Chap. 3, Ill. Rev. Stat. 1965 provides that a minor over the age of 14 years may nominate his own guardian if he has none. Neither the statute nor the preference as expressed by a 16 year old boy are controlling but are entitled to be given proper consideration together with all other factors in the determination of what will best promote the minor's welfare. Wellcome v. Wilk 339 Ill. App. 444, 90 N.E. 2d 260 and People ex rel Stockham v. Schaedel 340 Ill. 560, 173 N.E. 172. Although there is evidence to the contrary, we believe that there is ample evidence demonstrating that the best interests of the minor will be advanced if he remains with respondent. Accordingly we believe the conclusions of the trial court that there had been no change in circumstances requiring change in custody is supported by the evidence and was not in error. The order of the Circuit Court of Bureau County is affirmed.

JUDGMENT AFFIRMED.

Coryn, P.J., and
Alloy, J. concur.

50413

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. RAY BROWN, Defendant-Appellant.	)	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY, CRIMINAL DIVISION.

MR. JUSTICE LYONS DELIVERED THE OPINION OF THE COURT:

This is an appeal from a conviction, after a bench trial, for the offense of robbery with sentence in the Illinois State Penitentiary for a period of from one (1) to three (3) years.

At the trial, the State offered as a witness Officer Frank Keske, who testified that on May 2, 1963, he was a member of the Chicago Police Department's Task Force Undercover Unit. The officer related that at approximately 12:15 a.m. on the above date, he started his run as a decoy, carrying a camera case, pretending to be a helpless drunk; that he proceeded north on State Street; that defendant began following him and at the approximate address of 623 South State Street, defendant said, "give me the case, I'll carry that for you"; that defendant pulled the camera case from the shoulder of the officer and shoved the policeman; and that subsequently the cover men assigned to the Task Force detail converged on the scene and placed defendant under arrest.

The State next offered Officer Jesse Brown as a witness and he testified that on the date and time in question, he was in the same block as Officer Keske, whom he was covering; that he was located in a doorway; that Officer Keske passed; that he subsequently observed defendant come from a hotel and approach Officer Keske from behind; that after a few seconds, defendant pulled the camera case from the shoulder of Officer Keske; that a slight struggle ensued; and that he and another officer came to the assistance of Officer Keske and placed defendant under arrest.

The third and final witness for the People was Officer Wardeen Mason, another member of the Task Force Undercover Unit.

Officer Mason testified that he saw defendant come from a hotel; that defendant conversed with Officer Keske; that he observed defendant taking a camera case from the shoulder of Officer Keske; that he witnessed defendant push the officer against a parked automobile when Officer Keske shoved defendant away; and that he and Officer Brown effected the arrest of defendant.

There was a contradiction between the testimony of Officer Keske and that of Officer Mason in that Officer Keske testified that defendant had the camera case when he was placed under arrest and Officer Mason testified that he believed the decoy, Officer Keske, had the camera case and not the defendant.

Defendant Brown testified in his own behalf. His version of the events in question was that he was standing in front of his hotel when a cab drove up and a man, who appeared to be intoxicated, alighted from the vehicle and inquired about a hotel; that the man asked him to show him where another hotel was located and as defendant obliged, the man continued to stumble and fall; that as they crossed the intersection of Balbo and State Streets, another man, later identified as Officer Brown, came up from behind and inquired as to what was occurring; that defendant became excited and drew back; that he was subsequently arrested; and that he never took anything from the person of Officer Keske.

Defendant was found guilty of the crime of robbery and judgment was entered on the finding and motions for a new trial and in arrest of judgment were denied. After a hearing on aggravation and mitigation, the court sentenced defendant to the Illinois State Penitentiary for one (1) to three (3) years.

Defendant's theory of the case is that the court erred when it overruled defendant's motion for a finding of not guilty at the close of the State's case because the State failed to show defendant's guilt beyond a reasonable doubt. Defendant relies on People v. Ibom,

25 Ill.2d 585, 185 N.E.2d 690 (1962), for the proposition that where two equally reasonable hypothesis exist, the law requires the adoption of the one which is consonant with the innocence of the accused. Defendant's position is that there is an alternative explanation of defendant's conduct consistent with his innocence. Defendant alleges that there were contradictions in the testimony of Officers Keske and Mason and these contradictions substantiated defendant's claim of innocence. Defendant further alleges that if defendant's version of the occurrence were to be accepted, essentials of the crime charged could not be proven, to-wit, intent to take the camera case and a taking or assumption of control of the camera case by defendant.

At the outset, it is a general proposition of law that a trial court as the trier of fact, is peculiarly suited to determine questions of truthfulness, and a reviewing court will not readily substitute its own conclusion unless proof is so unsatisfactory so as to justify a reasonable doubt of guilt. People v. Boney, 28 Ill.2d 505, 192 N.E.2d 920 (1963). In People v. Jenkins, 24 Ill.2d 208, 181 N.E.2d 79 (1962), the court stated at page 210:

> "the question of the weight of the evidence was for the trial judge who heard and saw the witnesses and who was, therefore, in a much better position to determine which witnesses were worthy of belief. . . ."

In the instant case, defendant attempted to convince the court that his motions and actions were those of a good samaritan. The court was not convinced by defendant's testimony. Two of the officers testified that defendant attempted to pull the camera case from Officer Keske. The testimony of Officer Mason that Officer Keske had possession of the camera case when he arrived at the scene to make the arrest can be explained by the fact that Officer Keske could have subsequently retrieved the case from defendant. The other apparent

discrepancies in the testimony of the officers are not inconsistent with a hypothesis of guilt.

For the above reason, the decision of the trial court is proper and the judgment is affirmed.

JUDGMENT AFFIRMED.

BRYANT, P.J., and BURKE, J., concur.

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

General No. 10644 Agenda No. 5

Golda Atherton, Plaintiff-Appellant vs. City of Champaign, a municipal corporation, and American Casualty Company of Reading, Pennsylvania, a corporation, and H. R. Bresee, d/b/a Midwest Adjustment Company, and John Curtis, Defendants-Appellees	)	Appeal from Circuit Court Champaign County

CRAVEN, J.:

The plaintiff originally brought suit against the city of Champaign for injuries allegedly sustained on March 12, 1961, through the city's negligent maintenance of its sidewalk. The plaintiff failed to comply with the requirements of sec. 1-4-2 of ch. 24, Ill. Rev. Stat. 1961, set forth below:

> "Within 6 months from the date that such an injury was received or such a cause of action accrued, any person who is about to commence any

> civil action in any court against any municipality for damages on account of any injury to his person shall file in the office of the city attorney, if there is a city attorney, and also in the office of the municipal clerk, either by himself, his agent, or attorney, a statement in writing, signed by himself, his agent, or attorney, giving the name of the person to whom the cause of action has accrued, the name and residence of the person injured, the date and about the hour of the accident, the place or location where the accident occurred, and the name and address of the attending physician, if any. . . ."

The plaintiff alleged that her failure to comply with the above provision was due to fraudulent representations and inducements made by agents of the defendant city of Champaign's insurance carrier, American Casualty Company of Reading, Pennsylvania.

The chronological history of the pleadings in this case is a legalistic labyrinth--a classic example of how a simple factual situation can be smothered in a maze of motions, orders and amended pleadings. It is necessary to recite the chronology of the proceedings to define the issues presented in this appeal.

The plaintiff filed her first complaint against the city of Champaign and American Casualty Company on March 9, 1962. The first count alleged negligence against the city and the second count claimed fraud against American Casualty Company. Upon motion of the defendants, both counts were

dismissed by order of court on July 11, 1962.

On July 31, 1962, the plaintiff filed an amended complaint realleging the sufficiency of the original two counts and setting forth a third count against American Casualty Company for fraud and a fourth count against H. R. Bresee, d/b/a Midwest Adjustment Company, for fraud. On January 8 of 1963, summary judgment for H. R. Bresee was granted as to Count IV and, upon motion, Count III against American Casualty Company was dismissed.

Thereafter, with leave of court and several thirty-day extensions, the plaintiff filed her second amended complaint which, after again asserting the sufficiency of the first four counts of her original and amended complaints, set out six additional counts in a 34-page pleading. Count V named the city as defendant and alleged negligence and fraud; Count VI named American Casualty Company as defendant and alleged fraud through the defendant's agents, H. R. Bresee, d/b/a Midwest Adjustment Company, and John Curtis; Count VII named H. R. Bresee, d/b/a Midwest Adjustment Company, as defendant and alleged fraud through defendant's agent, John Curtis; Count VIII named John Curtis as defendant and alleged fraud; Counts IX and X named American Casualty Company as defendant and set up wilful and wanton misconduct of the city and alleged a promissory estoppel with respect to the fraudulent inducements relied upon by the plaintiff.

On June 25, 1963, H. R. Bresee entered a special and limited appearance with a motion to strike Count VII of the second amended complaint, based upon the prior adjudication of January 8, 1963, granting Bresee summary judgment as to Count IV of the amended complaint. The court granted the defendant's motion and struck Count VII of the second amended complaint as to Bresee. On July 16, 1963, the court dismissed Count V of the second amended complaint against the city of Champaign. This dismissal was with prejudice. Thereafter, on August 8, 1963, the court granted summary judgment in favor of the defendant American Casualty Company as to Counts VI, IX and X of the second amended complaint. Finally, on December 29, 1964, the court granted summary judgment for the defendant John Curtis as to Count VIII of the second amended complaint. After the court granted summary judgment for the defendant John Curtis on December 29, of 1964, final orders had been entered against all parties. Summary judgment is proper where there is no genuine issue as to any material fact and where the moving party is entitled to a decree as a matter of law. (Ch. 110, sec. 57, Ill. Rev. Stat. 1961.) Summary judgment is a final and appealable order. Boim v. Russian American Bureau, 227 Ill. App. 182. However, there was no final and appealable order prior to December 29, 1964, the date on which summary judgment was entered against John Curtis, the last remaining defendant. Johnson v. City of Rockford, 26 Ill. App. 2d 133, 138, 169 N.E.2d 534 (1960). The appeal periods applicable to the other defendants did not

begin to run until a final adjudication was entered against all parties. Section 50(2), ch. 110, Ill. Rev. Stat. 1961, provides:

> "If multiple parties or multiple claims for relief are involved in an action, the court may enter a final order, judgment or decree as to one or more but fewer than all of the parties or claims only upon an express finding that there is no just reason for delaying enforcement or appeal. In the absence of that finding, any order, judgment or decree which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not terminate the action, is not enforceable or appealable, and is subject to revision at any time before the entry of an order, judgment or decree adjudicating all the claims, rights and liabilities of all the parties."

There was no such express finding as to any order entered prior to the dismissal of the final defendant, John Curtis, on December 29, 1964. In computing the 60-day period then applicable for filing a notice of appeal (ch. 110, sec. 76, Ill. Rev. Stat. 1963), we find the plaintiff's notice of appeal, filed on March 1, was timely as to all defendants and all decrees enumerated therein. Pettigrove v. Parro Const. Corp., 44 Ill. App. 2d 421, 194 N.E.2d 521 (1963).

The orders dismissing the city from this suit were proper. There was no compliance with the mandatory statutory notice requirements of Section 1-4-2 of the Illinois Municipal Code, and our Supreme Court has held compliance to be a condition precedent to suit against a municipality.

Walters v. City of Ottawa, 240 Ill. 259, 262, 88 N.E. 651 (1909). Erford v. City of Peoria, 229 Ill. 546, 553, 82 N.E. 374 (1907). Carlson v. Village of Glen Ellyn, 21 Ill. App. 2d 335, 158 N.E.2d 225 (1959). The city has no power to waive the notice requirements. Walters v. City of Ottawa, supra at 263 of 240 Ill. McCarthy v. City of Chicago, 312 Ill. App. 268, 275, 279-80, 38 N.E.2d 519 (1941). If the city itself could not waive the mandatory requirement of six months' notice, it follows that an insurance adjuster could not waive the same requirement, acting in the city's behalf. See 65 A.L.R.2d 1278, 1302.

The summary judgments entered against the other defendants in Counts VI, VII, VIII, IX and X present a different question. These final orders conclusively determined that the plaintiff had presented no justiciable issue of material fact, in light of the record, upon which she could predicate recovery.

In an attempt to distill the legal essence from the plaintiff's evidentiary method of pleading her causes against the several remaining defendants, we find that express deceit and fraud is alleged against John Curtis individually (Count VIII) and against H. R. Bresee through the acts of John Curtis as agent (Count VII) and against American Casualty Company through the acts of its agents, H. R. Bresee and John Curtis (Counts VI, IX and X). Count IX also alleges negligence and wilful and wanton misconduct of

the city attributable to the defendant American Casualty Company. Count X sets up a type of promissory estoppel against American Casualty Company through the representations and inducements of its alleged agent, John Curtis.

The conduct and representations upon which the plaintiff relies to establish her cause of action are as follows:

1. That defendant John Curtis stated that American Casualty Company would pay "any claim" the plaintiff had.

2. That the defendant John Curtis requested that the plaintiff not consult an attorney.

3. That the defendant John Curtis informed plaintiff that if she consulted an attorney she would receive less for her recovery.

4. That the defendant John Curtis informed the plaintiff that any notice required would be given by him and that all dealings thereafter should be with John Curtis as agent for the defendants Midwest Adjustment Company and American Casualty Company, and not with the city of Champaign.

5. That the defendant John Curtis stated that he was acting with full authority in behalf of the city.

6. The defendant John Curtis stated that there was nothing that he could do on behalf of the city until the plaintiff had been discharged by her physician.

These acts and representations were alleged to be falsely and knowingly and intentionally made in order to cause the plaintiff to rely upon the same and to become barred in her right of action against the city of Champaign.

The defendants state that such representations are

not actionable fraud because they were merely promises to perform future acts, expressions of opinion or intention. Hayes v. Disque, 401 Ill. 479, 82 N.E.2d 350 (1948). The defendants argue that the plaintiff unjustifiably relied on such representations because they were made by an adversary under no duty to inform her of the law which everyone is presumed to know.

To determine this question we must consider the relationship of the parties, their knowledge and duties to each other. The plaintiff, according to the allegations contained in the complaint, is a 65-year-old woman with a seventh-grade education. It is undisputed that John Curtis owed no duty to the plaintiff with respect to advising her of her legal rights. He could have relied upon the presumption that the plaintiff knew the law and waited until he received notification from the city of Champaign that the plaintiff had complied with the statutory notice requirements. If the statute was not complied with no claim could have been asserted. According to the allegations in the complaint, which must be taken as true for purposes of the defendants' motion for summary judgment in determining whether or not a material question of fact exists, John Curtis, a person with interests adverse to the plaintiff and in privity with a prospective defendant through an express insurance contract, affirmatively sought to gain the confidence of a comparatively

inexperienced and uneducated claimant and thereafter to advise her how to dispose of her prospective claim. According to the complaint, the plaintiff did rely upon said inducements to her detriment. The issue then becomes whether or not such conduct is actionable as fraud.

"Fraud" has been defined as all acts, omissions and concealments based upon a breach of a legal or equitable duty, trust or confidence, resulting in damage to another. Connolly v. Gishwiller, 162 F.2d 428. Illinois Minerals Co. v. McCarty, 318 Ill. App. 423, 48 N.E.2d 424 (1943). There are no inflexible rules to determine what is and what is not fraud. What is fraud will be determined by the facts of each case. Connolly v. Gishwiller, supra. Lawrence v. Thatcher, 332 Ill. App. 444, 75 N.E.2d 777 (1947). Whether or not a duty existed originally between these defendants and the plaintiff is not in issue. According to the pleadings, the defendant John Curtis, acting in behalf of his principals, H. R. Bresee and American Casualty Company, took it upon himself to establish a relationship with the plaintiff with respect to disposing of her claim against the city of Champaign. He realized the interests of his principals were antagonistic to the plaintiff. A duty or fiduciary relationship

may arise in many different ways. As ably pointed out in the following opinion:

> "Such fiduciary relation is not limited to cases of trustee and cestui que trust, guardian and ward, attorney and client, or other recognized legal relations, but it exists in all cases where confidence is reposed on the one side and a resulting superiority and influence on the other side arises therefrom. The origin of the confidence is immaterial. Schweickhardt v. Chessen, 329 Ill. 637, 649 /161 N.E. 118 (1928)7."... Fischer v. Slayton & Co., Inc., 10 Ill. App. 2d 167, 173 (134 N.E.2d 673, 676 (1956)).

Whether this woman was justified in accepting his advice is a question of fact. Suffice it to say that in light of the two subjects' background and the facts as pleaded, the adversity of interest was more apparent to the insurance adjuster than to the inexperienced claimant. This disparity in knowledge and experience was used to the benefit of the defendants and to the detriment of the plaintiff.

The plaintiff may not be able to sustain these allegations with proof. That question is not in issue. The issue is whether or not there is a question of material fact in light of the record which, if resolved in the plaintiff's favor, would support a recovery. The defendants argue that the plaintiff's answers to their interrogatories eliminate any factual issue necessitating further hearing or evidence in support of the plaintiff's allegations. We think not.

The plaintiff's answers to the interrogatories establish only that her son conferred with an attorney who represents the defendant city of Champaign in this action. There is no showing this was done with her knowledge or authorization. These answers in no way resolve the many allegations in support of the plaintiff's counts for express fraud. The only resolution rests in a hearing on the merits.

The sufficiency of Counts IX and X is not raised by the plaintiff in her brief and argument, and thus is waived. Counts I and V against the city of Champaign were properly dismissed for failure to comply with Sections 1-4-2 and 1-4-3 of the Illinois Municipal Code. The plaintiff pleaded over after the court dismissed Counts II, III and IV alleging fraud against American Casualty Company and H. R. Bresee. Since we find that a cause for fraud was sufficiently stated to raise material questions of fact in Counts VI, VII and VIII against American Casualty Company, H. R. Bresee and John Curtis, respectively, the original causes become merged in the latter and the question of sufficiency of the original counts becomes moot. In so holding, we indicate no opinion on the merits of this controversy and limit our findings to the pleadings and matters of record.

For the reasons stated, the action of the trial court as to the defendant city of Champaign is affirmed. The action of that court in dismissing Counts VI, VII and VIII is reversed, and the cause is remanded to the circuit court of Champaign County for further proceedings, in accordance with the views herein expressed.

Affirmed in part and reversed in part
and remanded with directions.

TRAPP, P.J., and SMITH, J., concur.

71 I.A. 2 433

No. 10695 Agenda No. 66-10

STATE OF ILLINOIS

IN THE APPELLATE COURT

FOURTH DISTRICT

People of the State of Illinois, Plaintiff-Appellee	:	Appeal from
vs.	:	Circuit Court
Larry Jon Sax, Defendant-Appellant	:	Woodford County

Smith, J.

Defendant appeals from an order revoking probation and sentencing him to the penitentiary. The order was based on a finding that he had committed the crime of armed robbery during the probation period. The fact of the crime itself is not disputed, defendant having asserted an alibi and arguing here that the evidence of his participation, i.e. identification, was not clear and convincing. The crime occurred around 6:20 P. M. on February 9, 1965, when two men forced their way into the home of the victims, taping their mouths and eyes, and handcuffing them, after which the home was ransacked. The sacked loot was later found in the yard.

As we know, and defendant is in agreement, the quantum of proof required in criminal cases cannot be equated to probation matters. Revocation, as we said in People v. Cook, 53 Ill. App. 2d 454, 202 N.E. 2d 674, requires proof of the violation by a preponderance of the evidence. We can agree with defendant that proof of identity must be clear and convincing, and still not accept such as an emendation of the quantum criterion, and we do not read People vs. Burrell, 334 Ill. App. 253, otherwise. Because such is the yardstick, it is incumbent upon us to be now convinced that the proof failed of this standard, as a matter of law, and not what we would have done had we sat at the hearing, to accept defendant's argument that the order was bad.

From a reading of the transcript, two things stand out, which, in our opinion, refute this point, the first being, positive identifications by the victims. Secondly, a funny thing happened while the robbers were on their way out of the house. One of them dialed a number, and said, "Are you ready, Johnson?", and a few minutes later, defendant's wife pulled her car into the victims' driveway--with a squad car right behind her!

This might have been sheer coincidence, maybe she had turned into the driveway to turn around, after having lost her way in quest of some curtain rods, as she so explained, and if this is really what happened, it was not very funny.

However, the occurrence could have been viewed as episodic, that is, if the trial court chose not to believe the wife, that certainly was its prerogative. It did opt not to and said so. The odds certainly favor this holding. While this happening, or happenstance if you will, would not have been enough standing alone, when coupled with the identifications, the quantum requirement was certainly satisfied, below and here.

We are told, though, that the proof of identity was incredible, and that we should look behind the testimonial assertions. This is hard for an appellate court to do, whether the proof itself is attacked as incredible or the witness who mouths such proof, and while we would never go so far as to say that it should never be done, still we feel that here credibility and credibleness were matters for the trier of the facts and not for us. Accordingly, we affirm the judgment appealed from.

Affirmed.

Trapp, P.J. and Craven, J. concur.

M50271

ARTHUR E. WIND, d/b/a CRAWFORD BUILDING MATERIAL COMPANY, Plaintiff-Appellee,	)	APPEAL FROM
vs.	)	MUNICIPAL DISTRICT
THOMAS PAULSON, Contractor, Defendant	)	CIRCUIT COURT
On Appeal of JOSEPH ADES, Defendant-Appellant.	)	COOK COUNTY.

MR. JUSTICE McCORMICK DELIVERED THE OPINION OF THE COURT.

The instant case was consolidated with the case of Thomas Paulson, d/b/a Paulson Plastering Service v. Joseph Ades. The two cases were tried together in the trial court, although they were tried in sequence. The trial court entered judgment against Paulson and Ades, defendants, in the sum of $403.31. Joseph Ades took an appeal to this court. Thomas Paulson did not appeal.

Arthur E. Wind, the plaintiff, failed to comply with Rule 5(m) of this court in that he has filed no brief and the time for such filing has long since expired. Under those circumstances there is no duty imposed upon us to fully discuss the case in the light in which it appears from a study of defendant's brief and abstract. We are warranted in reversing the judgment without further consideration. Tabron v. Pleasant, 64 Ill. App. 2d 367, 212 N.E.2d 312; 541 Briar Place Corp. v. Harman, 46 Ill.App.2d 1, 196 N.E.2d 498; Ogradney v. Daley, 60 Ill. App. 2d 82, 208 N.E.2d 323; Wright v. Chicago Transit Authority, 43 Ill. App. 2d 408, 193 N.E.2d 597; C.I.T. Corp. v. Blackwell, 281 Ill. App. 504.

Moreover, a review of the record and arguments presented to us, though ex parte, prompts us to conclude that plaintiff's failure to

contest the appeal is tantamount to confession of error. Tabron v. Pleasant, 64 Ill. App. 2d 367.

The judgment in the case of Thomas Paulson, d/b/a Paulson Plastering Service v. Joseph Ades was reversed as to defendant Joseph Ades with judgment here in Ades' favor. [71 Ill.App.2d 464, Abst.] In the instant case we enter the same ruling, reversing the judgment of the Circuit Court as to defendant Joseph Ades, with judgment here in his favor.

REVERSED.

DRUCKER, P.J., and ENGLISH, J., concur.

Publich Abstract Only.